Supreme Court, U.S.
FILED

AUG 4 - 2006

OFFICE OF THE CLERK

No. 06-181

IN THE SUPREME COURT OF THE UNITED STATES

SALLIE N. PEELER,
Petitioner,
v.
MCI, INC., AND MCI WORLDCOM NETWORK SERVICES, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Henry J. Price
Ronald J. Waicukauski
Counsel of Record
Jana K. Strain
PRICE WAICUKAUSKI & RILEY, LLC
301 Massachusetts Avenue
Indianapolis, IN 46204
Tel: (317) 633-8787

Nels Ackerson
ACKERSON KAUFFMAN FEX, P.C.
1250 H Street, N.W., Suite 850
Washington, D.C. 20005-3952
Tel: (202) 833-8833
Attorneys for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

Whether a landowner may be divested of property rights without compensation by a trespasser's discharge in bankruptcy?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14(1)(b), the following list identifies all parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

Petitioner here and appellant below, Sallie N. Peeler, in her individual capacity as a landowner in Carmel, Marion County, Indiana; respondents here and appellees below, MCI, Inc., formerly known as MCI WorldCom, Inc., and MCI WorldCom Network Services, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14(1)(b) and 29.6, Petitioner states she is an individual and is not a corporation.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings i

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iv

Table of Appendices vii

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement 1

Factual Background 3

Proceedings Below 3

I. Reasons for Granting this Writ 5

A. Review Is Warranted To Correct an Emerging Trend in Bankruptcy Case Law that Has Unconstitutionally Extinguished the Property Rights of Thousands of Landowners by Immunizing a Trespasser from Post-Discharge Liability for Its Continuing Trespass 5

1. The Seventh Circuit's decision below is the most recent in a series of decisions that have expansively interpreted Old WorldCom's bankruptcy discharge to cover post-discharge trespass claims to the detriment of innocent landowners. 6

2. The decisions in question violate federal and state constitutional rights requiring just compensation for the taking of property. 8

II. Review Is Warranted to Resolve Conflicts Among a Number of Lower Court Decisions 12

A. A conflict exists among lower court decisions on the applicability of a bankruptcy discharge to wrongful conduct occurring post-discharge. 12

B. While Indiana clearly recognizes the continuing trespass nature of Old WorldCom's conduct, thus making the decision below clearly wrong, this Court should set a uniform standard as to the effect of a bankruptcy discharge under these circumstances. 16

III. Review Is Warranted on Grounds of Public Policy Since the Decisions In Question Reward a Bankrupt Trespasser for Wrongful Conduct While Penalizing Innocent Landowners and Competitors of New MCI Who Have Abided by the Rules. 19

Conclusion 21

TABLE OF AUTHORITIES

Cases

Buchenau et al., v. Sprint Corp. et al.
Cause No. 28:1332 (N.D. Ill.) 8

Chatam v. Clark Laundry, Inc.,
191 S.E.2d 589, 590 (Ga. Ct. App. 1972) 19

City of Shawnee, Kansas v. AT&T Corp.,
910 F.Supp. 1546 (D. Kan. 1995) 18

DuBois v. Ford Motor Credit Co.,
276 F.3d 1019, 1022 (8th Cir. 2002) 12

Fisher v. Carey,
119 N.E. 376 (Ind. App. 1918) 16, 17

Graham v. Connersville & New Castle Junction R.R. Co.,
36 Ind. 463, 1871 WL 5025, at * 3 (Ind. Nov. 1, 1871) 11

In re Chateaugay Corp.,
944 F.2d 997, 1008 (2nd Cir. 1991) 14

In re Goodman v. Goodman,
873 F.2d 598, 602 (2nd Cir. 1989) 15

In re Nichols,
440 F.3d at 850, 854 n.2 (6th Cir. 2006) 9, 10

In re Stoltz,
315 F.3d 80, 94 (2nd Cir. 2002) 19

In re Texaco, Inc.,
254 B.R. 536, 559 (Bankr. S.D.N.Y. 2000) 15

In re Torwico Electronics, Inc.,
8 F.3d 146 (3rd Cir. 1993) 14

In re WorldCom, Inc.,
320 B.R. 772 (Bankr. S.D.N.Y. 2005) 7
In re WorldCom, Inc., et al., Reorganized Debtors v. West,
328 B.R. 35 (Bankr. S.D.N.Y. 2005) 7
International Paper Co. v. MCI WorldCom Network Services, Inc., 442 F.3d 633 (8th Cir. 2006) 7
Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555 (1935) 10
Milestone Contractors, L.P. v. Indiana Bell Tele. Co., Inc.,
739 N.E.2d 174, 177 (Ind. Ct. App. 2000) 11, 12
O'Loghlin v. County of Orange,
229 F.3d 871, 875 (9th Cir. 2000) 12, 15
Peeler v. MCI, Inc.,
447 F.3d 992 (7th Cir. 2006) 1, 5, 7
Penn Central Corp. v. U.S. Railroad Vest Corp.,
955 F.2d 1158 (7th Cir. 1992) 13
Prune Yard Shopping Center v. Robins,
447 U.S. 74 (1980) 9
Savannah Elec. & Power Co. v. Horton,
162 S.E. 299, 300 (Ga. Ct. App. 1932) 19
Sidener v. Norristown, Hope & St. Louis Turnpike Co.,
23 Ind. 623, 627 (1864) 11
Sparks Tune-Up Centers, Inc., v. Strong,
175 B.R. 230, 232 (N.D. Ill. 1994) 15
Ward v. McGlory,
358 Mass. 322 (1970) 18
Zografos et al., v. Quest Comm. Corp. et al.
(D.Or. Cause No. 6:00-cv-06201-AA) 8

Statutes

11 U.S.C. §§ 101(5), 524(a)(2) 12, 15
28 U.S.C. § 1254(1) 1

Constitutions

United States Constitution,
Fifth Amendment 8, 10, 11, 17, 18
Indiana Constitution,
Article I, §21 11

Table of Appendices

Opinion of the United States Court of Appeals, Seventh Circuit—Argued January 24, 2002 and Decided May 8, 2006 (Affirmed and Remanded) A-1

Order on Plaintiff's Motion for Emergency Relief—Denied, August 17, 2006 ..... A-4

Entry on Plaintiff's Request for Permanent, or in the Alternative, Preliminary Injunctive Relief—Denied, July 31, 2006 ..... A-5

Findings of Fact, Conclusions of Law and Order—WorldCom is temporarily enjoined from trespassing on the plaintiff's property, June 28, 2001 ..... A-12

Constitutional Provisions A-17

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sallie N. Peeler, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The *per curiam* order of the court of appeals is styled *Peeler v. MCI, Inc.* and is reported at 447 F 3d 992 (7th Cir. 2006) (Pet. App., A-1). The opinion of the United States District Court for the Southern District of Indiana denying a preliminary injunction is not reported. (Pet. App., A-5).

JURISDICTION

The final decision of the court of appeals was entered on May 8, 2006. (Pet. App. A-1). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution, the Indiana Constitution, and the Bankruptcy Code are reproduced in an appendix to this petition. (Pet. App. A-17-18).

STATEMENT

This petition raises a significant issue for this Court's consideration, namely whether a landowner may be divested of property rights without compensation by a trespasser's discharge in bankruptcy. In four decisions, two federal courts of

appeal and one bankruptcy court have interpreted the WorldCom bankruptcy discharge to do precisely that, with potential applicability to thousands of landowners across the nation. For the reasons explained below, it is respectfully submitted that these decisions misapply bankruptcy law, property law, and constitutional law and conflict with prior decisions of this Court and several federal courts of appeals.

These decisions also conflict with important public policy considerations. WorldCom built much of its fiber optic network without obtaining appropriate easements from the owners of the land on which the cable was installed. At the time of its filing for bankruptcy, WorldCom was a party to a pending class action settlement in which WorldCom had agreed to settle trespass claims of tens of thousands of landowners for millions of dollars in return for proper easements and had initiated condemnation proceedings with some landowners, including the petitioner here, Sallie Peeler, to acquire easements by eminent domain. The effect of the decisions in question has been to grant all such easements by judicial fiat to New MCI, WorldCom's successor, without any compensation whatsoever to the landowners. By rewarding the bankrupt trespasser and penalizing the innocent landowners, these decisions violate principles of fundamental fairness and basic property rights.

The decisions also penalize other telecommunications companies by giving New MCI an unfair competitive advantage. New MCI's competitors who have abided by the law must pay fair market rates for rent or outright purchase of the easements that they have used and will continue to use in the future. New MCI, because its predecessor chose to trespass, rather than to lease or purchase, and then went bankrupt, finds itself with perpetual easement rights at no cost by virtue of the decisions below.

Factual Background

The Petitioner, Sallie N. Peeler ("Peeler"), owns real property in Hamilton County, Indiana, including property adjacent to and under a strip of land commonly known as the Monon Trail, a walking and biking path which runs between 96th Street and 146th Street in Hamilton County. Peeler's property includes subsurface rights relating to fiber-optic cable within the Monon Trail right of way. (Pet. App. A-5, A-6, A-12, A-13; Docket No. 33, Ex. A, B).

On April 10, 2001, the City of Carmel executed a Cable Agreement with MCI WorldCom and MCI WorldCom Network Services, Inc., (collectively, "Old WorldCom") that purported to allow Old WorldCom to enter property along the Monon Trail to install fiber-optic cable. (Docket No. 33, Ex. H) The City expressly advised Old WorldCom that it did not own a fee simple interest in "significant portions" of the Trail and expressly disclaimed giving consent for entry onto any property that it did not own in fee-simple. After receiving the City's consent, but without any effort to contact Peeler, Old WorldCom entered Peeler's property and installed telecommunications cables and related equipment in the subsurface without providing Peeler any compensation for the taking of her property rights.

Proceedings Below

Immediately upon discovering Old WorldCom's actions and before the installation was completed, Peeler sought a temporary restraining order and preliminary injunction against Old WorldCom in Indiana state court in Hamilton Superior Court, Cause No. 29D03-0106-MI448, on behalf of herself and a class of similarly situated landowners in Hamilton County. A temporary restraining order was entered after notice on June 28, 2001 by the Hamilton Superior Court, enjoining Old WorldCom from trespassing on Peeler's property, including but not limited

to "ceas[ing] any installation or construction of fiber optic or other telecommunications facilities" and "remov[ing] all equipment and supplies" from the property. (Pet. App. A-12-A-16).

On July 5, 2001 Peeler filed her Class Action Complaint seeking damages for trespass, ejectment, and injunctive relief. On the same date, Old WorldCom removed the case to the United States District Court for the Southern District of Indiana, Indianapolis Division, based upon diversity of citizenship, alleging the potential cost to Old WorldCom if Peeler's request for injunctive relief were granted would exceed $75,000, thereby claiming to satisfy the jurisdictional minimum. (Docket No.1).

On July 24, 2001, the court verbally denied Peeler's request for permanent and preliminary injunction, and on July 31, 2001, the court reduced its denial to a written order. (Pet. App. A-5; Docket No. 48). On August 2, 2001, Peeler filed a Verified Motion for Expedited Appeal and a Verified Motion for Emergency Relief with the United States Court of Appeals for the Seventh Circuit. (Appellate Docket No. 1421975-1; 1421976-1. (hereinafter "App. Docket")). On August 15, 2001, the court of appeals denied both motions as moot. The parties completed briefing on the appeal and oral argument was heard on January 24, 2002.

On November 30, 2001, Old WorldCom filed a Counterclaim for the Appropriation of Real Property in the district court, which it amended on December 13, 2001. (Docket No. 85). The counterclaim belatedly sought to condemn Peeler's property rights for telecommunications purposes. On December 31, 2001, Peeler filed her objections to the condemnation. (Docket No. 86).

On July 1, 2002, while the appeal and the condemnation counterclaim were pending, Old WorldCom filed for bankruptcy

protection. Proceedings for the appeal and the condemnation counterclaim were both automatically stayed. On July 30, 2004, MCI WorldCom Network Services, Inc. emerged from bankruptcy. While in bankruptcy, MCI, Inc. a newly formed corporation that did not exist prior to bankruptcy was created. These two entities (referred to collectively herein as "New MCI" or the "Reorganized Debtor") now purport to own and operate the fiber optic telecommunications lines at issue in this case.

On July 27, 2005, Peeler requested leave to file a supplemental brief with the Seventh Circuit limited to the issue of the scope of the bankruptcy discharge on Petitioner's Indiana claims. (App. Docket No. 1885288-1). New MCI opposed the motion. (App. Docket No. 1890774-1). The requested supplemental briefing was not allowed.

On May 8, 2006, the Seventh Circuit issued a per curiam order affirming the district court's denial of the injunction and concluding that, because of the general discharge in bankruptcy, "claims based on the existence of the underground conduit, and the cable's use to transmit photons that carry voice and data traffic, have been discharged," 447 F.3d at 993, and that the only claims Peeler has available are her claims for possible future entries to repair the existing cable, *id.* at 993-94.

I. Reasons For Granting This Writ

A. Review Is Warranted To Correct an Emerging Trend in Bankruptcy Case Law that Has Unconstitutionally Extinguished the Property Rights of Thousands of Landowners by Immunizing a Trespasser from Post-Discharge Liability for Its Continuing Trespass.

The ruling by the court of appeals has the effect of extinguishing Peeler's right to exclusive possession and control

of her property – a right protected by both the Indiana and United States Constitutions – by allowing New MCI to occupy and use the property through which it installed its cable without ever paying the compensation required by law for the taking of an easement and without ever lawfully acquiring those property rights.

Peeler does not dispute that it is now too late to stop the installation of the cable on her property because that was accomplished by Old WorldCom immediately after the district court's injunction ruling and before Old WorldCom filed bankruptcy. She submits, however, that the fact the installation was completed does not make New MCI's continued use of her property lawful, does not give New MCI the right to be on her property now or in the future, does not make New MCI the owner of Peeler's property rights, and does not extinguish New MCI's liability for its continuing and future unlawful presence on her property.

1. The Seventh Circuit's decision below is the most recent in a series of decisions that have expansively interpreted Old WorldCom's bankruptcy discharge to cover post-discharge trespass claims to the detriment of innocent landowners.

The effect of Old WorldCom's bankruptcy on property rights has been addressed by the bankruptcy court for the Southern District of New York in two decisions and by the Seventh and Eighth Circuit Courts of Appeal. Through the course of these cases, the courts have drifted from the limited intended purpose of the bankruptcy discharge to create substantial rights for a trespassing Reorganized Debtor at the expense of innocent landowners across the nation whose property rights have been infringed by New MCI.

On February 14, 2005, the bankruptcy court held that New MCI's bankruptcy discharge barred two putative class-action claims arising out of New MCI's use of fiber-optic cable it had installed pre-petition along certain railroad rights of way, but continued to control and use rent-free in the post-discharge period in Kansas and Alabama. *In re WorldCom, Inc.*, 320 B.R. 772 (Bankr. S.D.N.Y. 2005).

Subsequently, in *In re WorldCom, Inc., et al., Reorganized Debtors v. West*, 328 B.R. 35 (Bankr. S.D.N.Y. 2005), the bankruptcy court extended its prior ruling to bar a putative class action asserting similar claims under Georgia law. The decision of the bankruptcy court is pending on appeal in the District Court for the Southern District of New York, Cause Number 1:06CV00748.

In *International Paper Co. v. MCI WorldCom Network Services, Inc.*, 442 F.3d 633 (8th Cir. 2006), the United States Court of Appeals for the Eighth Circuit addressed claims by a landowner ("IP") seeking relief for trespass and other claims against New MCI under Arkansas law. Relying on the prior decisions of the New York bankruptcy court in the *WorldCom* cases, the Eighth Circuit concluded that any trespass claim IP may have had was discharged in bankruptcy. *Id.* at 636-37.

After the entry of these decisions, the Seventh Circuit addressed Peeler's appeal in a per curiam decision. The appeals court recognized that both the WorldCom bankruptcy district court and the Eighth Circuit had considered claims similar to Peeler's and found them discharged. The Seventh Circuit went on expressly to "agree with" those decisions, adding that "[*c*]*laims based on the existence of the underground conduit, and the cable's use to transmit photons that carry voice and data traffic, have been discharged.*" *Peeler*, 447 F.3d at 993. (emphasis added).

If left uncorrected by this Court, these decisions will affect not only the parties in these cases but landowners across the nation whose property New MCI is continuing to occupy and use without having obtained consent by easement or other lawful means. Prior to bankruptcy, Old WorldCom was a party to a proposed settlement by which it, along with four other telecommunication companies, sought to obtain such easements along 56,000 combined miles of railroad corridor. *See Buchenau et al., v. Sprint Corp. et al.* Cause No. 28:1332 (N.D. Ill.), Docket No. 17, 18, 30, 31, 32; *Zografos et al., v. Quest Comm. Corp. et al.* (D.Or. Cause No. 6:00-cv-06201-AA), Docket No. 156, 179. The proposed settlement was expected collectively to cost the telecommunication companies, including Old WorldCom, more than $220 million for which they were to receive in return a release for past trespass claims and easements authorizing their continued use and occupation of the property for fiber optic purposes. Before this settlement could be approved, WorldCom filed for bankruptcy. One consequence of the bankruptcy is to release New MCI from liability for the past trespass claims. Peeler has no quarrel with that consequence. But the decisions by the Seventh Circuit and the other courts extend much further, effectively granting New MCI the easements WorldCom had sought in the settlement, with a prospective effect never intended by the bankruptcy law and without any compensation to the landowners.

2. The decisions in question violate federal and state constitutional rights requiring just compensation for the taking of property.

The Takings Clause of the Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." It is clear that a takings analysis under the Fifth Amendment need not be limited to an outright acquisition of property by a government entity, but may include transfers of property from one non-governmental entity to another under laws or regulations. *In re*

Nichols, 440 F.3d at 850, 854 n.2 (6th Cir. 2006) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980). Accordingly, a transfer of property effected by a court by application of bankruptcy law requires that just compensation be paid.

In a case factually similar to this one, this Court went to great lengths to describe property rights and how the permanent occupation of property – whether by television cables attached to the exterior of a building or telecommunications lines in the subsurface of the soil – is a taking. In *Loretto*, this Court addressed the situation of television cables by referencing earlier cases involving telephone and telegraph lines, explaining: "Property rights in a physical thing have been described as the rights *to possess, use and dispose of it. To the extent that the government permanently occupies physical property, it effectively destroys each of these rights."* *Loretto,* 458 U.S. at 435-36 (emphasis added) (internal quotation marks, citation, and footnote omitted).

The physical occupation of real property is "the quintessential deprivation of property." *Id.* at 430 (citing *inter alia,* J. Lewis, Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity ..., *either upon, above or below the surface, and whether temporary or permanent, is a taking*: as by constructing a ditch through it ...or extending structures over it, as a bridge or *telephone wire*" (footnote omitted; emphasis added)).

There can be no doubt that, in this case and the other WorldCom bankruptcy related cases, the courts have authorized a taking of Peeler's – and many other landowners' property rights – by explicit approval of New MCI's continual and permanent physical occupation of their property for telecommunications purposes. To suggest that New MCI's taking of these property rights is but a trespass misses the forest by looking at only one branch in the bundle of property rights.

It is true that the cable and conduit at issue in this case occupy only a subsurface area of Peeler's and the other landowners' properties. But the size or location of the occupation does not control the outcome here. This Court's precedent "clearly establish[es] that permanent occupations of land by such installations as telegraph and *telephone lines*, rails, and *underground* pipes or *wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." Id.*, at 429-30 (emphasis added and footnote omitted). It is not the size of the invasion, but the permanency and the interference with the landowner's rights that are significant to the takings analysis.

While it is true that bankruptcy laws have long been construed to authorize the impairment of *contractual* obligations, this does not change the rule that the power of the bankruptcy laws is subject to the Fifth Amendment's prohibition against taking property without just compensation. *In re Nichols*, 440 F.3d 850 (6th Cir. 2006). Since at least 1935, this Court has recognized the tension between permitting the impairment of contractual obligations in bankruptcy proceedings while at the same time maintaining the integrity of property rights. *Id.* (citing *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982)).

In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), this Court concluded that "the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property ... resort must be had to proceedings by eminent domain...." *Id.*, 55 S.Ct. at 869. In granting property rights to New MCI without resort to condemnation and without payment of compensation, the decision by the Seventh Circuit in the instant case and the other

WorldCom decisions have violated the Fifth Amendment to the U.S. Constitution.

Peeler's bundle of property rights is protected not only by the federal constitution, but also by the Indiana Constitution, which provides protections that are at least co-extensive with – and she submits are more protective – than the Fifth Amendment. Article I, Section 21 of the Indiana Constitution expressly prohibits the taking of private property for public use, by a private corporation, unless "just compensation therefor be *first assessed and tendered*." *Sidener v. Norristown, Hope & St. Louis Turnpike Co.*, 23 Ind. 623, 627 (1864) (emphasis added).

Assuming Old WorldCom had the authority to exercise the power of eminent domain, it had the plain duty, "if [it] could not otherwise acquire the right, to proceed to acquire the same by legal appropriation *before* taking possession." *See Graham v. Connersville & New Castle Junction R.R. Co.*, 36 Ind. 463, 1871 WL 5025, at * 3 (Ind. Nov. 1, 1871) (hereinafter *Graham II*) (citing Ind. Const. art. I, §21 and *Graham v. Columbus, etc., Railway Co.*, 27 Ind. 260, 1886 WL 2687 (Ind. Nov. 1 1866) (hereinafter *Graham I*)(emphasis added). As the *Graham II* court explained, the condemnor may not take first and pay later: "whatever may have been the case under the first constitution, or whatever may be the rule in other states . . . it is plainly provided in the fundamental law, that 'no man's property shall be taken . . . without [just] compensation first assessed and tendered." *Id.* at *3.

In *Milestone Contractors, L.P. v. Indiana Bell Tele. Co., Inc.*, 739 N.E.2d 174, 177 (Ind. Ct. App. 2000), *trans. dismissed,* the Indiana Court of Appeals concluded that fiber optic cables installed in the subsurface were fixtures pertaining to real property because they met the three requirements for transforming them as they were (1) buried in the ground, (2) adapted for the specific use of the part of the realty to which they were attached, and (3) the installer demonstrated an intent

that they become a permanent fixture to the property. *Milestone*, 739 N.E.2d at 177. Just as in *Milestone*, the fiber optic cable and conduits in this case meet the three prong test: they were annexed to the realty, they were adapted to the use of the realty as a telecommunications line, and they were intended by both Old WorldCom and New MCI to be a permanent part of the freehold.

Clear Indiana law dictates the status and ownership of the cables and conduits as well as the subsurface area in which they are installed. By its decision, however, the Seventh Circuit has ignored Indiana law and allowed Old WorldCom to do precisely what the Indiana Constitution proscribes: to take first without payment; and then, even more egregiously, to keep the property in perpetuity without ever paying for it. This Court should grant certiorari to resolve these conflicts.

II. Review Is Warranted to Resolve Conflicts Among a Number of Lower Court Decisions.

A. A conflict exists among lower court decisions on the applicability of a bankruptcy discharge to wrongful conduct occurring post-discharge.

A discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). Thus, once a debtor receives a discharge, a creditor cannot seek to recover a discharged debt from the debtor. *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002). It is generally recognized that Section 524(a)(2) does not enjoin suits against a reorganized debtor or a new, non-debtor entity based on conduct after emerging from bankruptcy. *See, e.g., O'Loghlin v. County of Orange;* 229 F.3d 871 (9th Cir. 2000)(holding that although the debts created by a debtor's pre-

petition violation may be discharged, nothing in the Bankruptcy Code allows the reorganized debtor to bar the claims arising out of its post-discharge violations). A conflict, however, has arisen in the lower courts as to the applicability of this rule to events occurring post-discharge.

Conflicts with existing precedent are evident, including conflicts within the Seventh Circuit itself. In *Penn Central Corp. v. U.S. Railroad Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992), the Seventh Circuit concluded that a ruling by the bankruptcy court as to where certain assets would go as part of its confirmation of a reorganization plan did not elevate the debtor's rights of way to fee simple status. Rather, it explained the confirmation and discharge "did nothing of the sort. It meant [these assets] would be free and clear of creditor's claims. It was not adjudicating the rights of [the debtor] vis-à-vis neighboring landowners." *Id.* at 1163-64. Such an argument, the appeals court said, is "frivolous." *Id.* at 1163-64. Yet, in Peeler the Seventh Circuit interpreted the Old WorldCom discharge to achieve the result of adjudicating the rights of New MCI vis-à-vis neighboring landowners like Peeler by denying the existence of any claims.

In light of existing precedent and the issues presented on appeal, there was no reason that Peeler – or any reasonable litigant – should have expected that all her property rights would be transferred to New MCI by the general discharge of pre-petition claims, a result that clearly ignores her constitutional rights. Peeler respectfully submits this Court should grant her petition and clarify the relationship between the scope of a bankruptcy discharge and protections from unconstitutional takings.

Post-discharge events have been addressed by many courts in various contexts, including among others, violations of environmental law, civil rights law, trademarks and breaches of contract. In these other contexts, the decisions of the lower

courts have consistently held that a discharge of pre-petition conduct under the Bankruptcy Code does not preclude an action against a reorganized debtor for *post*-discharge wrongful conduct. In the context, however, of a continuing trespass and of takings without just compensation, the decisions by the Seventh and Eighth Circuits and of the New York Bankruptcy Court, have been to the contrary. The conflict should be resolved by this Court.

In the context of environmental claims, the Second Circuit held in *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2nd Cir. 1991), that when an injunction does no more than impose an alternative to a payment right, then the injunction is a dischargeable "claim;" however, if an injunction, no matter how phrased, requires the debtor to take any action that ends or ameliorates post-discharge unlawful conduct (in that case, polluting), then the order is not a "claim," as that term is defined in the bankruptcy code, and the right to pursue and enforce the order is unaffected by the debtor's discharge. *Id.* Thus, there was no preclusion to an order requiring the debtor to stop unlawful conduct in the post-discharge period.

Likewise, the Third Circuit in *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993), considered a case where, post-petition for Chapter 11, the New Jersey Department of Environmental Protection found an illegal seepage pit on the debtor's property containing hazardous wastes that were migrating into local waters. When the agency ordered the debtor to "close" the seepage pit, the debtor argued that the order was a dischargeable claim. Rejecting that argument, the Third Circuit held that the order was not a discharged claim, but was instead a demand that Torwico "take action to ameliorate ongoing hazard," and was not discharged. *Id.* at 151. The court expounded: "What [the state] has *is a right to force the debtor to comply with applicable environmental laws* by remedying an existing hazard." *Id.* (emphasis added).

In *In re Texaco, Inc.*, 254 B.R. 536, 559 (Bankr. S.D.N.Y. 2000), the bankruptcy court, considering this same line of cases, addressed whether the reorganized debtor's post-discharge breach of certain contracts constituted "claims" against the debtor, under 11 U.S.C. § 101(5), that had been discharged by confirmation of the plan. Rejecting the reorganized debtor's argument, the court stated: "It is not surprising that no court has ever held that *future claims* for possible breaches of contract constitute 'claims' under Section 101(5) that must be filed pre-confirmation." *Id.* at 559 (emphasis added).

Other federal courts have reached similar conclusions. *See, e.g., In re Goodman v. Goodman*, 873 F.2d 598, 602 (2nd Cir. 1989) ("the debtor is free to acquire new property unburdened. But he may not make an end run around the Bankruptcy Code and the National Labor Relations Act"); *O'Loghlin,* 229 F.3d at 875. ("the bankruptcy laws provide no justification for [such a broad discharge] ...A 'fresh start' means only that; it does not mean a licence [sic] to violate the law); *Sparks Tune-Up Centers, Inc., v. Strong*, 175 B.R. 230, 232 (N.D. Ill. 1994), (rejecting former debtor's claim of discharge as to "ongoing trademark infringement" after the filing of the bankruptcy petition).

As in each of those cases, the events at issue in the instant case occurred post-discharge in that they concern conduct by the New MCI against Peeler's property rights *after* the discharge. In finding a discharge of pre-petition claims can extinguish liability for post-discharge wrongful conduct, the Seventh Circuit, like the Eighth Circuit and the New York Bankruptcy Court have taken a position that is at odds with the above precedent. Moreover, regardless of the bankruptcy discharge of pre-petition claims, *nothing* that occurred in Old WorldCom's bankruptcy resulted in Peeler's consent to New MCI's use and possession of her property or operated to transfer her property rights to New MCI. Rather, like the debtors in each of the referenced cases, New MCI is simply engaged in continuing

wrongful conduct in the post-discharge period as the current operator and user of the fiber-optic cable buried and continuously used in Peeler's property without her consent. By keeping its cable and conduit on her property and by transmitting its signals through her land, New MCI is engaged in post-discharge conduct. In light of the conflict of opinion in the lower courts on this issue, review by this Court is warranted.

B. While Indiana clearly recognizes the continuing trespass nature of Old WorldCom's conduct, thus making the decision below clearly wrong, this Court should set a uniform standard as to the effect of a bankruptcy discharge under these circumstances.

Indiana long ago rejected the suggestion that the installation of a telephone line was a one-time, permanent trespass. In *Fisher v. Carey*, 119 N.E. 376 (Ind. App. 1918), the Indiana Court of Appeals considered a claim by a landowner that his neighbor, without right or license, attached a telephone wire to the landowner's telephone line for the purpose of using the telephone line. The landowner cut the line to stop the trespass, and the neighbor repaired it and indicated his intent to continue to use the line. The landowner sought injunctive relief and damages. *Id.*, at 377. On appeal the neighbor argued there was "but a single trespass" and, therefore, no basis for injunctive relief. *Id.* Noting that the landowner held the right to the property (the telephone line), that the neighbor had no legal right to use it, and that despite the landowner's repeated demands that the neighbor stop using the line, the neighbor persisted and threatened continued use of the line, the court held:

> It thus appears that the acts of which complaint are made *do not consist of a single isolated trespass, but a trespass continuous in its nature, which would furnish grounds for many actions at law.* These allegations bring appellees well within the settled rule, stated by

Pomeroy in his work on Equity Jurisprudence, as follows:

> If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the grounds of avoiding a repetition of similar actions.

Fisher, 119 N.E. at 377. Each of the challenged decisions is in conflict with Indiana law as announced in *Fisher*.

However, having a uniform application of the United States bankruptcy law as well as constitutional rights protected by the Fifth Amendment dictate that this Court should adopt a rule as to the uniform effect of the bankruptcy discharge and not one dependant upon the vagaries of sometimes ancient and frequently unsettled state law. If one examines the effect of the New York Bankruptcy Court's decision followed by the Eighth and Seventh Circuits, the following is apparent.

1. Old WorldCom did not have any rights to lay a cable on Peeler's property or thousands of other landowners' property.
2. Old WorldCom did not use the available eminent domain law to pay for and acquire any rights in Peeler's or other property.
3. By the bankruptcy discharge order New MCI obtained property rights on a nationwide scale that Old WorldCom did not possess before the bankruptcy.
4. New MCI will continue to use the property rights in disregard of the requirements for just compensation

contained in the Fifth Amendment to generate enormous income.

Indiana does not stand alone on this question of continuing trespass. Other courts have also concluded that circumstances like those at issue here give rise to a claim of continuing trespass. For example, in *City of Shawnee, Kansas v. AT&T Corp.*, 910 F.Supp. 1546 (D. Kan. 1995), the City of Shawnee brought an action in trespass against AT&T to determine AT&T's rights to operate fiber optic telecommunications cables within the City's boundaries after AT&T refused to make payments for use of the rights-of-way. Because the action was brought more than two years after the installation of the cable, AT&T argued that the City's action was barred by the applicable statute of limitations for trespass. *Id.* at 1560. In rejecting this argument, the court distinguished between the *installation* of the cable and the *use* of it, concluding that, whereas the installation of the cable was a permanent trespass that occurred outside the statute of limitations, the continued *use* of it by the transmission of pulses across the City's land, constituted a continuing trespass which renewed with each pulse intentionally caused to traverse the City's property. *Id.* at 1561-62.

Similarly, in *Ward v. McGlory*, 358 Mass. 322 (1970), the Supreme Judicial Court of Massachusetts distinguished between the installation of electric cable and the use of it, finding two separate causes of action for each trespass. The court held that while the erection of poles and stringing of wires across the plaintiff's land was itself a trespass, it went on to hold that the electric company "is also responsible for a continuing trespass. It did not have permission to transmit electric current across the plaintiff's land. ... [T]he act of connecting the wires to their source and continuously transmitting electricity was an affirmative voluntary intrusion onto the plaintiff's property." *Id.*

The Georgia Court of Appeals, in *Savannah Elec. & Power Co. v. Horton*, 162 S.E. 299, 300 (Ga. Ct. App. 1932), likewise found a power company had committed a continuing trespass by attaching brackets that supported its electrical wires to the plaintiff landowner's garage. A subsequent case described *Horton* as involving "electric current which recreates the trespass constantly by running through the wire. Thus, while erecting the wire may be a one-act trespass, *it is the constant use and control of the current which creates a continuing and repeated trespass*." *Chatam v. Clark Laundry, Inc.*, 191 S.E.2d 589, 590 (Ga. Ct. App. 1972) (emphasis added).

This Court should consider the consequences of this bankruptcy discharge and make a uniform policy throughout the United States applicable to this post-discharge conduct which does not vary among the several states since the impact on landowners' property and constitutional rights should be the same throughout the country. As affected by this post-discharge conduct, the constitutional protections should be equally applicable to all.

III. Review Is Warranted on Grounds of Public Policy Since the Decisions In Question Reward a Bankrupt Trespasser for Wrongful Conduct While Penalizing Innocent Landowners and Competitors of New MCI Who Have Abided by the Rules.

The public policy implications of an overly broad reading of WorldCom's bankruptcy discharge are readily seen by comparing the results obtained by New MCI in the decisions at issue here with a hypothetical telecom company who instead of trespassing with its cable, obtained lawful easements for an agreed annual rent. If the renter telecom company went through bankruptcy and was discharged, it would not be relieved of its obligation to pay rent for its continued use of the easements after discharge. Numerous cases have reached this conclusion. *See, e.g., In re Stoltz*, 315 F.3d 80, 94 (2nd Cir. 2002). Yet, the

decisions below hold, in essence, that because WorldCom was a trespasser, not a lawful renter, New MCI gets the use of the properties rent-free forever. This Court should not allow such a perverse result to stand.

The discharge of pre-petition claims was intended to give a reorganized debtor a fresh start, not perpetual immunity. A reorganized debtor cannot and should not be allowed to violate non-bankruptcy law – whether state or federal – simply because it received a "get out of jail free card" for its pre-petition debts. Nor should a bankruptcy discharge be used as a vehicle to grant the debtor the right to use and hold property where it had no right to do so before the bankruptcy. Yet, that is exactly what the court of appeals ruling effectuates in this case.

The transfer of rights from a rightful property owner to a trespasser by such an interpretation of a general bankruptcy discharge goes far beyond giving the debtor a fresh start; it reallocates property to a wrongdoer at the expense of an innocent party and starkly conflicts with public policy.

The impact of the WorldCom decisions at issue here extend far beyond the property rights of one Indiana landowner. It affects many thousands of landowners over the nation. Without due consideration of the law of the states where their land sits, without due consideration of the landowners' property rights in those states, and without due consideration of the fundamental principles long part of the law of property, one court, then another, has issued a broad and sweeping purported discharge of pre-petition claims that has, by judicial acceptance, morphed into a global property transfer to New MCI. The decisions at issue in this case reflect a trend that, if allowed to continue unchecked, can and will erase thousands of property owners' rights from the records and – without compensation or justification – transfer those rights to a trespasser armed with a vague court order.

The effect of this series of decisions is so devastatingly broad that, upon consideration, this Court should not make the permissible scope of the bankruptcy discharge turn on the speculation whether a particular state court would find a permanent or continuing trespass under the New MCI facts. The impact is the same in either case and only post-discharge conduct is effected. This Court should make it clear that there is no land transfer to New MCI by this discharge, and New MCI must pay for the land rights it has usurped and continues to use at tremendous profit.

In light of the myriad conflicts with existing state and federal precedent, including precedent of constitutional proportions, review of these decisions is well-warranted. Petitioner respectfully submits this Court should grant her petition for writ and resolve these conflicts for the benefit of the courts and landowners across the country.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,
PRICE WAICUKAUSKI & RILEY, LLC

Henry J. Price
Ronald J. Waicukauski
Counsel of Record
Jana K. Strain
301 Massachusetts Avenue
Indianapolis, IN 46204
Tel: (317) 633-8787

Nels Ackerson
ACKERSON KAUFFMAN FEX, P.C.
1250 H Street, N.W., Suite 850
Washington, D.C. 20005-3952
Tel: (202) 833-8833

Attorneys for Petitioner

United States Court of Appeals, Seventh Circuit.

Sallie N. **PEELER**, Plaintiff-Appellant,
v.
MCI, INC., and **MCI** WorldCom Network Services, Inc.,
Defendants-Appellees.
No. 01-3019.

Argued Jan. 24, 2002.
Decided May 8, 2006.

Before EASTERBROOK and WOOD, Circuit Judges.[FN†]

FN† Circuit Judge Ripple, the third member of the panel originally assigned to this appeal, recused himself on April 20, 2006, following a change of counsel and took no further part in the proceedings.

PER CURIAM.
Sallie Peeler filed this action in a state court seeking an injunction against the installation of fiberoptic cable along the Monon Trail, an abandoned railroad right-of-way in which Peeler claims an interest as the owner of an adjacent parcel. After the suit's removal under the diversity jurisdiction, the district court denied Peeler's request for a preliminary injunction. Events during the pendency of Peeler's appeal make it unnecessary to decide whether the district judge erred.

First, MCI completed the installation of the cable, so that step cannot be enjoined. Second, the corporation formerly known as MCI WorldCom, Inc. (the original defendant) became a debtor in bankruptcy, leading us to stay consideration of Peeler's appeal. 11 U.S.C. §362. Peeler did not file a claim in WorldCom's bankruptcy, so the general discharge that WorldCom eventually received extinguishes her principal claims-that Indiana law requires a deposit of compensation before a public utility may lay cable under a railroad right-of-way, and that the existence and use of the cable without

compensation are trespasses. Similar claims have been considered, and held to be discharged, not only by the district court that handled the WorldCom bankruptcy but also by our colleagues on the eighth circuit. See *International Paper Co. v. MCI WorldCom Network Services, Inc.*, 442 F.3d 633 (8th Cir.2006); *Browning v. MCI, Inc.*, 339 B.R. 836 (S.D.N.Y.2006). We agree with these decisions and need not add to their exposition. Claims based on the existence of the underground conduit, and the cable's use to transmit photons that carry voice and data traffic, have been discharged.

Peeler's situation differs in one respect from that of the landowners in *International Paper* and *Browning*. MCI installed a "fiber box" on land in which Peeler asserts an interest. This structure, which permits workers to access the cable should it need repair or replacement, occupies about 15 square feet of the surface. Any obligation to pay compensation on account of the box's existence has been discharged; but if MCI should use the box in the future to access the underground cable then the repair teams would re-enter Peeler's land. MCI lacks Peeler's consent to do this. Cf. *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979). A discharge does not permit the debtor to engage in fresh injurious acts after a bankruptcy's conclusion. See *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985); *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir.1992); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir.1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991).

Because the possibility of future entries to repair existing cable was not the basis of Peeler's motion for equitable relief in 2001, it does not provide any basis for disturbing the district court's decision. But it does show that the case is not moot. We therefore affirm rather than vacate the district court's decision-limited as it is to an order (now five years old) declining to ***994** enjoin MCI's installation and use of the cable.

Before the district court takes up whether Indiana law entitles Peeler to either an injunction against future entry or compensation for an easement, it must decide whether Peeler has the ownership interest she asserts. MCI denies that she has any legal interest in the land on which the fiber box sits. If Peeler does have a property interest-and if MCI has not secured an easement through condemnation proceedings in state court, see Ind. Code §32-24-4-1-the district court must decide whether to certify the proceeding as a class action, as Peeler has proposed. See *Smith v. Sprint Communications Co.*, 387 F.3d 612 (7th Cir.2004); *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978 (7th Cir.2002); *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir.2001).

Decisions on these questions may be unnecessary if the district judge relinquishes supplemental jurisdiction. 28 U.S.C. §1367(c). When WorldCom removed the case, federal jurisdiction was supplied by the fact that an injunction against completing and using the cable would have cost WorldCom more than $75,000. All controversy about the cable's existence and use having been resolved by the bankruptcy, however, the remaining dispute about access to the fiber boxes (the one near Peeler's land and 12 others along the Monon Trail) likely is worth less than $75,000. If so, that claim would depend on the supplemental jurisdiction, for it would not have supported removal independently. If the jurisdictional amount is not satisfied with respect to this distinct claim for relief, the district court should consider returning this case to state court.

Affirmed And Remanded.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SALLIE PEELER, on behalf of herself and all others similarly situated, Plaintiff,	)	
vs.	)	IP 01-983-C-Y/G
MCI WORLDCOM, INC. and MCI WORLDCOM Network Services, Inc., Defendants.	)	

ORDER ON PLAINTIFF'S MOTION FOR EMERGENCY RELIEF

Before the court is Plaintiff's Motion for Emergency Relief. The court has read and reviewed the Plaintiff's motion, the supporting and opposing briefs, and finds that Plaintiff has not offered new evidence or new legal authority that would warrant granting the injunction this court previously denied. Moreover, the court finds that Plaintiff cannot demonstrate a likelihood of success on the merits, the lack of an adequate remedy at law, or that the public interest favors injunctive relief. Accordingly, Plaintiff's motion is **DENIED**.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Emergency Relief is **DENIED**.

SO ORDERED this 17 day of August 2001.

/s/Richard L. Young
RICHARD L. YOUNG, JUDGE
United State District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SALLIE PEELER, on behalf of herself and all others similarly situated, Plaintiff,	)	
vs.	)	IP 01-983-C-Y/G
MCI WORLDCOM, INC. and MCI WORLDCOM Network Services, Inc., Defendants.	)	

ENTRY ON PLAINTIFF'S REQUEST FOR PERMANENT, OR IN THE ALTERNATIVE, PRELIMINARY INJUNCTIVE RELIEF

Plaintiff Sallie Peeler ("Plaintiff") moves for injunctive relief on behalf of herself and of all others similarly situated against Defendants MCI Worldcom, Inc. and MCI Worldcom Network Services, Inc. ("Worldcom"). The court, having considered Plaintiff's motion, the supporting and opposing briefs, and having considered the evidence and testimony elicited by the parties on July 17, 2001, now **DENIES** Plaintiff's motion.

I. Background

A. Clark v. CSX

The Monon Trail is a strip of land that lies between 96th and 146th Street in Clay Township, Hamilton County, Indiana, that was formerly owned by CSX as a railroad right-of-way. In 1993, the landowners whose land abuts the Monon Trail brought a class action suit against CSX, seeking the quiet title to the strip of land. *See Clark v. CSX Transp., Inc.*, 737 N.E.2d

752, 756 (Ind.Ct.App. 2000). After the initial statewide class certification, the *Clark* court certified a subclass, known as the Monon Subclass, which was then further divided into three categories, denominated as A, B, and C. In an Order dated January 6, 1999, the trial court in *Clark* found that CSX did not own fee simple title to any parcel on Category A land.[1] *See* Plaintiff's Class Action Complaint, Ex. A. Category A land, such as Plaintiff's, has proceeded through final judgment, and no appeals have been taken.

On June 21, 2000, Plaintiff conveyed by quitclaim deed a fee interest in the former CSX right of way to the City of Carmel. To date, Plaintiff owns only subsurface rights relating to fiber optic cable. Plaintiff's Ex. 12.

B. The Instant Litigation

In 1995, CSX granted MFS Communications Company, Inc. ("MFS") the right to install telecommunications facilities along the CSX transportation corridor now used for the Monon Trail. MFS installed two conduits along this corridor and placed a single fiber optic cable in one of the two conduits. The cable has been operational since that time. Plaintiff never objected to the installation of these facilities.

WorldCom acquired MFS in 1996. Sometime after April 2001, WorldCom pulled a new fiber optic cable through the conduit MFS installed in 1995. In the last week of June 2001, WorldCom sent a utility contractor to Plaintiff's property in order to replace an existing splice box located on said property. Plaintiff notified the contractor's employees that they did not have a right to be on her property. She then told them to leave. They ignored her demands and continued to work. She later learned that these

1. The parties dispute whether the Clark decision finally determined Plaintiff's ownership interest in the land. Because that issue is not central to the court's analysis, the court will not address that issue.

men were agents of WorldCom. She and her neighbor, William Thomsen, then contacted their attorneys and, on June 28, 2001, filed a temporary restraining order in state court on behalf of the Category A landowners defined in *Clark*. Ironically, the trial judge who granted Plaintiff's request was the same trial judge who ruled in the *Clark* case. The order states:

> WORLDCOM is hereby temporarily enjoined from trespassing on the plaintiff's property, including, but not limited to:
>
> a. WORLDCOM must cease any installation or construction of fiber optic or other telecommunication facilities on the former Monon right of way in the City of Carmel and Clay Township;
>
> b. WORLDCOM must remove all equipment and supplies from the former Monon right of way in Carmel and Clay Township.

At this point, the new cable has been fully installed in the 1995 conduit. Activation of this cable requires only the completion of the splicing operation in the splice box on the property that Plaintiff owns. WorldCom estimates that this project will take approximately four hours to accomplish. WorldCom does not seek to place additional permanent equipment or facilities on the parcel at issue.

II. Discussion

"A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). "If the court is satisfied that these factors have been established, the

court must then balance the harms to both parties using a 'sliding scale' analysis: the greater the moving party's likelihood of prevailing on the merits, the less strongly it must show that the balance of harms weighs in its favor." *Ferrell v. United States Dep't of Housing and Urban Development*, 186 F.3d 805, 811 (7th Cir. 1999). "The court must also consider the public interest by weighing the effect that either granting or denying the injunction will have on nonparties." *Id*

The jurisdiction of this court is predicated on diversity of citizenship. Therefore, the court must apply the rule of law that the state's Supreme Court would apply. *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 719 (7th Cir. 1994).

A. Public Interest

WorldCom contends that Plaintiff's request for injunctive relief is contrary to the public interest. In support of its contention, WorldCom cites the court to *Kincaid v. Indianapolis Natural Gas Co.*, 24 N.E. 1066 (Ind. 1890). In *Kincaid*, the Board of Commissioners of Hamilton County granted to the Indianapolis Natural Gas Company the right to lay its pipeline in the country road. *Id.* at 1066. Prior to the time plaintiff filed suit, the gas company had laid its gas lines for the purpose of supplying the City of Indianapolis and its surrounding counties with natural gas. *Id.* With demand rising, the gas company extended its pipes to connect the main line and system with additional gas wells. *Id.* The gas company was in the process of completing this task when plaintiff filed suit. *Id.* The trial court entered a temporary injunction, but refused to grant a "perpetual injunction." *Id.* Plaintiff appealed.

The Indiana Supreme Court upheld the judgment of the trial court. In its decision, the Court found that plaintiff owned the land, and, as such, it could not be taken away without just compensation. *Id.* at 1067. The right to compensation, however, did not translate into an automatic right to injunctive relief. *Id.* The Court recognized that the use sought by the gas

company "to supply citizens with gas" was one that could be acquired by eminent domain. *Id.* It denied plaintiff's request for injunctive relief because the harm to the public outweighed the plaintiff's private interest in the enjoyment of his land. Specifically, the Court reasoned:

> The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens... There is present here an element of public policy which exerts a controlling influence. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural gas...

Id. at 1067.

Like *Kincaid*, Plaintiff's request for injunctive relief would seriously impair the rights of the public. Plaintiff does not dispute that WorldCom has the right to condemn as a public utility. See Plaintiff's Status Report at 3. Moreover, WorldCom installed its conduit under the Monon Trail in 1995 without objection from Plaintiff and has used those facilities for telecommunications purposes along the Monon Trail since then. Because WorldCom's facilities serve the public interest, and because Plaintiff remained silent for years before she offered her objection, the court finds Plaintiff is not entitled to injunctive relief.

B. Adequate Remedy at Law

WorldCom also contends that Plaintiff has an adequate remedy at law. WorldCom cites the court to Plaintiff's Complaint as well as to Plaintiff's prior dealings with other entities that wished to use the Monon Trail. The Court agrees with WorldCom.

First, Plaintiff's pleadings implicitly acknowledge that she has an adequate remedy at law. In Count I of Plaintiff's Complaint, Plaintiff seeks "common damages for trespass such as reasonable value of the use of the land for Defendants' commercial purposes" or, at Plaintiff's election, all revenues arising from Defendants' trespass. (Compl., ¶ 35). In Count III, Plaintiff seeks to recover profits based on a theory of unjust enrichment. (Compl., ¶ 42). Finally, in Count V, Plaintiff seeks to recover treble damages based on trespass. (Compl., ¶ 49).

Second, Plaintiff's prior dealings reveal that she has an adequate remedy at law. For example, Plaintiff was a party to another case previously pending in this court, *Hinshaw et al. v. AT&T,* Cause No. 99-C-9313-II/G, in which she accepted a monetary settlement from AT&T. Further, in a state court action that was pending in Hamilton Superior Court, entitled *City of Carmel v. Bradley A. Peeler, Sallie N. Peeler and Precedent Mortgage Company,* Cause No. 29D01-9907-CP-000436, Plaintiff gave the City a quitclaim deed in return for monetary compensation.

Finally, Plaintiff is a putative class member of a related case filed in this court entitled *Rodney Busenbark, Rick Harte, and J.M. Campbell Farms, Inc. and all others similarly situated v. MCI WorldCom, Inc. and WorldCom Network Services, Inc.*, Case No. 98-1245-Y/G. The Third Amended Complaint defines the class as "all owners of land in Indiana that is or was subject to an easement for the limited purpose of operating a railroad on which Defendants have entered to install, maintain or operate a fiber optic or other telecommunications cable without obtaining the consent of the owner of the land." Am. Compl., ¶ 7. Paragraph 22 of the Amended Complaint alleges that WorldCom entered into agreements with railroad companies, including CSX, to purchase rights to install, maintain, or operate fiber optic cable in rail corridors. Thus, Plaintiff is clearly a potential member of the putative class in *Busenbark.* Yet, counsel in that case (who are also counsel for Plaintiff in this case) did not request injunctive relief even though it involves

the same conduit that was installed in 1995. Given that, the court finds that Plaintiff has an adequate remedy at law.

III. Conclusion

For the reasons set forth above, the court finds that the Plaintiff is not entitled to a preliminary injunction, as she is unable to show that an injunction is in the public interest or that there is no adequate remedy at law. Accordingly, Plaintiff's Request for a Permanent, or in the Alternative, Preliminary Injunctive Relief is **DENIED.**

SO ORDERD this 31st day of July 2001.

/s/ Richard L. Young, Judge
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

STATE OF INDIANA	)	IN THE HAMILTON
	) SS:	SUPERIOR COURT
	)	NO. 3
COUNTY OF HAMILTON	)	CAUSE NO. 29D03 0106 MI 448

SALLIE N. PEELER	)
	)
Plaintiff,	)
	)
	)
vs.	)
	)
MCI WORLDCOM	)
Network Services, Inc.	)
	)
Defendant.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court having reviewed affidavits and other papers presented by the Plaintiff, having considered arguments of counsel, and having taken this matter under advisement, now issues the following Order on the Plaintiff's Verified petition for Temporary Restraining Order and supporting affidavits.

The Court finds as follows:

1. The plaintiff is a resident of Clay Township, Hamilton County.

2. The plaintiff's property is parcel number 13-01-03-11-011.000. That parcel has been classified as a Category A parcel, which is a property in which CSX does not own fee simple title, by Order of this Court, dated January 6, 1999, in the lawsuit, *Clark v. CSX Transportation, Inc.*, Cause No. 29D 03-9308-CP-404.

3. The property is on the west side of the former railroad right of way of the CSX railroad, and the plaintiff owns rights to the mid-line of that former railroad right of way. The right of way is presently being prepared for use as a trail by the City of Carmel.

4. The plaintiff has quitclaimed rights to the City of Carmel sufficient for Carmel to construct and maintain the proposed trail, and under her transaction with Carmel she has retained the following rights:

Litigation Claims and Compensation. Grantors retain and shall own all rights which may now or hereafter exist in favor of the owner of the Fee Simple Area and/or Landscape Easement Area (collectively, the "Areas") with respect to pending quiet title claims affecting the Areas and the fiber optic cable or other telecommunications system(s) which is (are) presently installed, or in the future may be installed, below the surface of the Areas. The Grantee will make no claim to any amount arising from or relating to any litigation pending against CSX Transportation, Inc. or American Telegraph and Telegraph Company (or their respective successors, affiliates, subsidiaries, and assigns). Notwithstanding the foregoing, relocation of said cables or system(s) and/or authorization of new cable or system(s) and/or the right to authorize the installation of any new or additional cables or system(s) shall take place only with the prior written consent of the Grantors and Grantee.

5. The plaintiff owns all of the subsurface rights for fiber optic uses or occupancies of the former railroad right-of-way land on which fiber optic conduits and/or other telecommunication facilities are presently being installed.

6. The plaintiff has not been approached by any representative of MCI WORLDCOM Network Services, Inc. ("WORLDCOM") with respect to obtaining rights to install fiber optic conduits or other telecommunications facilities on her land.

7. On Wednesday, June 27, 2001, the plaintiff saw WORLDCOM's vehicles and construction equipment for the installation of plastic conduits, a large amount of the plastic conduits, and an operation that was already underway to install new telecommunications conduits in the subsurface which the plaintiff own the right to control.

8. The plaintiff requested that the WORLDCOM workmen stop construction, but they refused.

9. WORLDCOM'S construction includes lateral drilling of new horizontal passage ways in the subsurface soil for the installation of a new fiber optic conduit and fiber optic cable.

10. The construction was continuing when last observed at noon today.

11 The defendant has a Cable Agreement with the city of Carmel that gives it a city permit to "install certain fiber optic cable in existing ductwork."

12. The Cable Agreement specifically states in paragraph 5(i) that:

> That WORLDCOM and/or Sizemore understand that the City does not own a fee simple interest in significant portion of the Monon Trail, owns and easement interest only or no property interest at all in some segments of the Monon Trail, that the ownership of portions of the Monon Trial is

currently in litigation, and that the City cannot and does not provide WORLDCOM and/or Sizemore with any easements, consents, permits and/or rights of entry needed to perform the Project and to construct, install, repair, service, maintain, remove and/or replace the Utility Facilities on any portions of the Monon Trail which the City does not wholly own and on all other real property located outside of the City's limits and/or jurisdiction.

13. The defendant's conduct as described above constitutes a willful trespass.

14. The plaintiff's remedies at law are inadequate and she will suffer irreparable harm if the defendant is not enjoined from its trespass.

15. The plaintiff has a reasonable likelihood of success on the merits of her claims.

16 The plaintiff need not to post a bond since her position seeks only an Order that the defendant comply with Indiana law and this Order imposes no additional burden upon the defendant other than that already imposed by Indiana law.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that:

1. WORLDCOM us hereby temporarily enjoined from trespassing on the plaintiff's property, including, but not limited to:

    a. WORLDCOM must cease any installation or construction of fiber optic or other telecommunication facilities on the former Monon right of way in the City of Carmel and Clay Township

b. WORLDCOM remove all equipment and supplies from the former Monon right of way in Carmel and Clay Township.

2. WORLDCOM is directed to immediately send copies of the Order to all of its Agents, employees, representatives and all other persons associated with its efforts to enter land and install conduits or fiber optic material on the former Monon right of way in the City of Carmel and Clay Township, Hamilton County in the State of Indiana.

3. Surety bond of one dollar ($1.00) since this Order requires only that WORLDCOM comply with Indiana law.

The Court sets this matter for Hearing before the Bench on the Preliminary Injunction for the 6th day of July, 2001 at 2:30 p.m., 2 hours allocated.

ALL ORDERED AND ADJUDGED this 28th day of June, 2001.

/s/ William Hughes
Judge, Hamilton Superior Court #3

CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Indiana Constitution, Art. 1, § 21 provides:

> Section 21. No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

STATUTORY PROVISIONS

11 U.S.C. §524 (a) provides:

> 524. Effect of discharge
> (a) A discharge in a case under this title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.